

Book

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 60194-s76LJ BY LEONARD L. )  
AND LEROY A. COBLER )

\* \* \* \* \*

The time period for filing exceptions or comments to the March 23, 1988 Proposal for Decision in this matter has expired. The Montana Department of Fish, Wildlife, and Parks submitted a timely written correction. Timely written exceptions were received from Applicant Leonard L. Cobler, and from Objector Robert H. Lehman.

Having given the comments and exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision, and expressly incorporates them herein by reference.

The Department hereby takes notice of the correction offered by the Department of Fish, Wildlife, and Parks, and inserts the word "Road" in the description of Objectors' Exhibit 3 to more accurately describe the Exhibit. The sentence shall read, in relevant part, "Objectors' Exhibit 3 (FWP) is a photocopy of a bar graph which compares the average monthly flows in Ashley Creek (measured at Rogers Lake Road) . . . ." (Proposal for Decision, page 3.)

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## RESPONSE TO EXCEPTIONS

Response to Objector Lehman's Exception: Robert H. Lehman, who submitted an objection to the Application in this matter but who was unable to attend the July 2, 1987 hearing, filed a written exception to the proposed granting of a Permit to the Applicant, based on his concern that water conditions on Ashley Creek are getting worse. As part of his exception to the Proposal for Decision, Mr. Lehman submitted a copy of a report entitled "Living with Ashley Creek: Streambank Management and Nonpoint Pollution in the Ashley Creek Drainage, Flathead County, Montana" (January, 1987), prepared for the Flathead Conservation District, and asked that the information contained therein be considered. However, in order to be considered, documents must be properly introduced and the Applicant given the opportunity to exercise his fundamental right of cross-examination. No new evidence can be accepted at this point in the proceeding. See the Notice contained in the Proposal for Decision.

Mr. Lehman clearly indicated in his initial objection to the Application in this matter that his concern is maintenance of an adequate habitat for "fish and aquatic life." (Objection received by the Department on September 11, 1985.) Mr. Lehman's concern with regard to the Ashley Creek environment is admirable, however, the Department's record indicates that Ashley Creek stream conditions were fully addressed by the Montana Department of Fish, Wildlife, and Parks and the City of Kalispell in this matter. These entities provided testimony and evidence on the issue of instream flow maintenance which was given full

consideration, as reflected by the Findings of Fact and Conclusions of Law, and by the imposition of a limited period of diversion upon the Permit which was granted in this matter. (See Proposal for Decision, Findings of Fact 9 and 10; Conclusions of Law 7, 9, and 10; and Proposed Order.) Accordingly, the documentation submitted by Objector Lehman would not be dispositive, and denial of its late admission is without consequence.

Mr. Lehman also indicated in his exception that he had signed proposed conditions which would have limited the Applicants' volume to 9.06 acre-feet of water per year. However, as the letter accompanying the proposed conditions stated, the reduction was offered as a basis for settlement. When settlement of all the Objections did not take place, the matter went to hearing based on the original Application request. Since the Notice of Hearing clearly stated that the requested volume of water to be discussed at the hearing was 24.00 acre-feet, Mr. Lehman cannot have been unduly surprised by the grant of a volume greater than the 9.06 acre-feet of water which was offered as a settlement figure.

Response to Applicants' Exceptions: The Applicants have filed an exception to the proposed grant of a 7.29-acre place of use, and have requested that the place of use be restored to the 10 acres for which application originally was made, stating "the only reason we cut the acres back to 7.29 was because someone wanted to lease it and we thought it would be easier to obtain

the water rights. This deal fell thru. (sic), and we should never have changed from the original request of 10 acres."

(Applicants' Exception, received April 11, 1988.) The Applicants refer to FWP's statement that they would not object to the issuance of a permit for 75 gpm up to 15 acre-feet per year, to be used on a maximum of 10 acres, provided the period of appropriation did not include July and August. (See Proposal for Decision, page 5.)

While it is true that FWP had indicated that they would not oppose a 10-acre place of use, the City of Kalispell did not so stipulate. More importantly, there is no evidence in the record in this matter upon which to base granting the place of use as originally requested. Applicant Leonard L. Cobler testified repeatedly at the hearing that the Applicants' intent was only to irrigate the 7.29 acres of property which need to be rehabilitated as the result of a previous leasing arrangement. Absolutely no testimony or evidence was produced regarding the Applicants' desire (or ability) to beneficially irrigate the balance of the originally applied-for 10-acre place of use.

The Applicants' apparent reconsideration since the hearing does not overcome the fact that they based their testimony and evidence at the hearing, as the Objectors presumably based their cross-examination and argument, on a proposed irrigation of 7.29 acres of land. Therefore, the Department declines to modify the proposed place of use upward to 10 acres.



Regarding a related matter, the Applicants stated in their exception that the third-to-the-last sentence in Finding of Fact 7 ("The Applicant testified that the balance of the 10 acres originally described as the proposed place of use is occupied by houses and lawns . . . .") indicates a misunderstanding of where the buildings are located, since the houses and lawns are not located on the 10 acres originally applied for as the place of use. A review of the Applicants' testimony indicates that the designation of the location of the houses was ambiguous, since the Applicant was pointing to an area on a plat map (Applicants' Exhibit 2), which was not verbally identified during his testimony; therefore, while Leonard Cobler's testimony that "most of this is yard" (referring to an area on the map) could be interpreted to refer to a portion of the proposed place of use, it could also--as the Applicants suggest--refer to the balance of the Applicants' property. However, since the sentence is explanatory, rather than substantive, it is not necessary to modify Finding of Fact 7.

The Applicants further request that they be granted the right to store water in an irrigation ditch on their property for the months of July and August. Since the Applicants did not apply for a storage right or raise the issue at the hearing, and as the parties therefore have not had an opportunity to present testimony and evidence with regard to the potential effects or problems created by the suggested storage, the Department has no basis for granting a storage right as part of the Permit in this matter. If the Applicants so desire, they may file an

Application with the Department to add a storage right to the Permit.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 60194-s76LJ is hereby granted to Leonard L. and Leroy A. Cobler to appropriate 55 gpm up to 16.65 acre-feet of water per year for sprinkler irrigation of 7.29 acres of land located in the N $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 29, Township 28 North, Range 22 West, Flathead County, Montana. The water will be diverted from Ashley Creek, a tributary of the Flathead River, by means of a gas pump located at the point of diversion in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 29, Township 28 North, Range 22 West, Flathead County, Montana. The period of use shall be April 15 through June 30, inclusive, and September 1 through October 31, inclusive, of each year. The priority date for this Permit is July 12, 1985 at 10:03 a.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

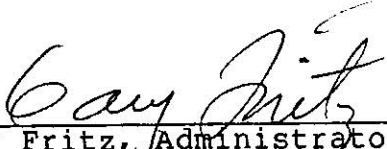
A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

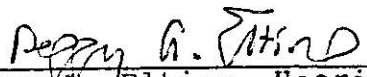
B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit uses.

D. The Permittee shall record the flow rates and volumes he is diverting, as well as the times of his diversions. These records shall be made available to the Department upon request.

DONE this 27 day of April, 1988.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6605

  
\_\_\_\_\_  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was sent to all parties of record at their address or addresses this 27th day of April, 1988.

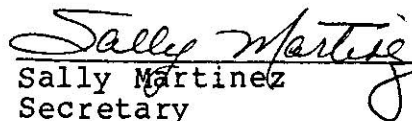
Leonard L. & Leroy A. Cobler  
80 Cobler Village Road  
Kalispell, MT 59901

Montana Dept. of Fish, Wildlife  
& Parks  
Larry G. Peterman  
1420 E. 6th Ave.  
Helena, MT 59620

Robert H. Lehman  
1930 Hwy 2 West  
Kalispell, MT 59901

City of Kalispell  
Attention: Andrew J. Hyde  
Drawer 1997  
Kalispell, MT 59903-1997

Chuck Brasen  
Kalispell Field Manager  
PO Box 869  
Kalispell, MT 59901

  
Sally Martinez  
Secretary

CASE # 60194

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 60194-s76LJ BY LEONARD L. )  
AND LEROY A. COBLER )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 2, 1987 in Kalispell, Montana.

Leonard L. Cobler, one of the Applicants in this matter, appeared at the hearing in person, and as representative for his son, Leroy A. Cobler.

Objector Montana Department of Fish, Wildlife, and Parks (hereafter, "FWP") was represented at the hearing by counsel Peter Funk.

James Vashro, Regional Fisheries Manager for FWP, appeared as a witness for Objector FWP.

Gary Anderson, Fisheries Technician, appeared as a witness for Objector FWP.

Objector City of Kalispell was represented at the hearing by Glen Neier, attorney for the City of Kalispell.

Andy Hyde, water and wastewater superintendent for the City, appeared as a witness for the City of Kalispell.

Charles Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office, appeared at the hearing as staff witness for

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the Department of Natural Resources and Conservation (hereafter, the "Department").

#### EXHIBITS

The Applicant offered two exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 consists of two photographs of Ashley Creek as it flows through Applicant's property. (Photos taken by Applicant on June 19, 1987.) Photo 1 is marked on the back with water depth measurements Applicant took on June 29, 1987.

Applicant's Exhibit 2 is two photocopies of plat maps of the Applicant's property, marked in blue ink at the hearing with the locations where the photographs (Exhibit 1) were taken.

Applicant's Exhibits 1 and 2 were accepted for the record without objection.

The Objectors offered nine exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1 (FWP) consists of photocopies of the two Statements of Claim for Existing Uses (Nos. 122355 and 122356), which FWP has filed on Ashley Creek for instream water uses for fisheries and water quality maintenance, and of the Statement of Claim (No. 122357) which FWP has filed on Ashley Lake Reservoir for storage.

Objectors' Exhibit 2 (FWP) is a Forest Service map of the north half of the Flathead National Forest, introduced to show the area of discussion from Ashley Lake to the City of Kalispell.

Objectors' Exhibit 3 (FWP) is a photocopy of a bar graph which compares the average monthly flow in Ashley Creek (measured at Rogers Lake) to the monthly flows as measured at the City of Kalispell, and to the total monthly claimed appropriations on Ashley Creek.

Objectors' Exhibit 4 (City of Kalispell) is a photocopy of a memorandum by Glen Neier, City Attorney for Kalispell, which sets forth the bases for the City's objection in the present matter.

Objectors' Exhibit 5 (City of Kalispell) is a photocopy of the Statement of Claim for Existing Water Rights (No. 104710-s76LJ) which the City has filed, claiming 5 cubic feet per second ("cfs") up to 3620 acre-feet of water per year for effluent dilution in conjunction with the city's sewage disposal plant.

Objectors' Exhibit 6 (City of Kalispell) is a photocopy of an Acknowledgement of Claim, stating that Claim No. 104710-s76LJ had been received by the DNRC.

Objectors' Exhibit 7 (City of Kalispell) is a photocopy of two partial USGS maps, taped together to depict Ashley Creek from the Applicant's proposed point of diversion to the City of Kalispell waste treatment plant. The exhibit was marked in black ink at the hearing with the location of Wise Bridge, a measuring point.

Objectors' Exhibit 8 (City of Kalispell) is a photocopy of dissolved oxygen sampling data in Ashley Creek, showing streamflow measurements, temperature, and dissolved oxygen levels at four sites, on four dates (June-July, 1987).

Exhibits 1 through 8 were accepted for the record without objection. FWP requested that the record be left open for submission of an additional exhibit, similar to Objectors' Exhibit 3, which would utilize more years of data from the Kalispell gaging station. The record was left open until August 3, 1987 for submission of this exhibit, which was received on August 3, 1987. This exhibit, which was marked as

Objectors' Exhibit 9 (FWP), is a photocopy of a two page letter from Peter Funk and a bar graph depicting the five-year average monthly flow on Ashley Creek at the outlet of Ashley Lake, the three-year average monthly flow at Kalispell (S. Meridian Road), and the total monthly appropriated water of record (as of 1985) on Ashley Creek.

Copies of Exhibit 9 were sent to the other parties of record. No objections to the exhibit were received; therefore, Objectors' Exhibit 9 was accepted for the record.

The Department offered one exhibit for inclusion in the record in this matter.

Department Exhibit 1 is a photocopy of Ashley Lake flow releases and flow measurement data obtained from FWP, a copy of FWP's discharge plan, and a graph comparing 1985 Ashley Creek flow with Lake releases and flow estimates.

Department Exhibit 1 was accepted for the record without objection.

The Department file was made available at the hearing for review by all parties. No party offered objection to any part of the file. Therefore the Department file is included in the record in its entirety.



The record in this matter was also left open until August 3, 1987 for possible submission of settlement conditions between the Applicant and the Objectors. Objector City of Kalispell did not submit anything further for the record. Objector FWP, in the cover letter accompanying Objectors' Exhibit 9, stated that FWP was continuing to "evaluate the possibility of compromise on its objection", and would notify the Department and the parties of its decision by August 7, 1987, at which time FWP notified the Hearing Examiner that it would not object to issuance of a Permit in this matter for time periods other than July or August, provided that the Permit was limited to 75 gallons per minute ("gpm") up to 15 acre-feet of water per year, to be used on a maximum of 10 acres. FWP further stated that they would "require" (presumably, for settlement of their objection) that the Permit be issued subject to specific language set forth by FWP, making the Permit subject to the instream flow rights of FWP, and further requiring the Permittee to cease diversion whenever the flow of Ashley Creek was less at the Kalispell gaging station than the flow being released from Ashley Lake.

Although the Hearing Examiner had requested that any settlement decision be submitted by August 3, 1987, FWP's September 21, 1987 submission will be considered, since the Hearing Examiner had not yet closed the record. However, there is no indication that FWP's proposed conditions for settlement were discussed with, and agreed upon, by Mr. Cobler. Therefore, the conditions will not be unilaterally imposed upon any Permit which Mr. Cobler may receive in this matter, but will be reviewed

for inclusion based upon Objector FWP's position that these conditions are necessary to protect its water rights.

The record in this matter was closed upon receipt of FWP's proposed settlement conditions on September 21, 1987.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. MCA §85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in §85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 60194-s76LJ was duly filed with the Department of Natural Resources and Conservation on July 12, 1985 at 10:03 a.m.

3. The pertinent portions of the Application were published in the Daily InterLake, a newspaper of general circulation in the area of the source, on August 21 and 28, 1985.

4. The source of water for the proposed appropriation is Ashley Creek, a tributary of the Flathead River.

5. The Applicant has applied for 75 gpm up to 24.00 acre-feet of water per year for new sprinkler irrigation of 10 acres of land located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 29 (7.2 acres) and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 29 (2.8 acres), all in Township 28 North, Range 22 West, Flathead County, Montana. In December, 1985, the Applicant offered to lower the requested flow rate, volume, and acreage in order to settle the objection received to his Application. Since the objections were not settled, the Applicant still requests the flow rate and volume set forth in his original Application. However, he now intends to irrigate only 7.29 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 29, Township 28 North, Range 22 West, Flathead County, Montana. (Testimony of Applicant, Applicant's Exhibit 2.) The Applicant testified that the balance of the 10 acres originally described as the proposed place of use is occupied by houses and lawns, which receive water from domestic wells.

The requested point of diversion remains in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 29, Township 28 North, Range 22 West, Flathead County, Montana. The requested period of use remains April 15 through October 31, inclusive, of each year.

6. The Applicant intends to grow alfalfa on the proposed place of use, irrigating it by means of a gas pump installed in Ashley Creek where the creek crosses his property (see Applicant's Exhibit 1). Water would be pumped into a main line feeding three to five laterals, with sprinklers, spread out across the property.

The Applicant stated that he does not intend to run the pump full-time, since the noise would be audible to the neighbors; rather, he intends to run the pump for approximately 12 hours per day, seven days a week. He stated that he would like to begin irrigating by May, make a first cutting of alfalfa in July, then irrigate to try to get a second cutting, or to maintain a vegetation cover on the land.

7. The Applicant applied for a flow rate of 75 gpm, based on a flow of 7.5 gpm per acre as suggested by the Soil Conservation Service for sprinkler irrigation of alfalfa in the area (testimony of Chuck Brasen), times 10 acres in the place of use. However, the Applicant has reduced the proposed place of use to 7.29 acres, and testified that he does not believe he would use 75 gallons per minute. The reduced place of use, multiplied by the suggested 7.5 gpm per acre, yields a flow rate of just under 55 gpm (54.675 gpm).

8. The Applicant testified that there has never been any lack of water in Ashley Creek where it crosses his property in the 20 years he has been observing the creek. He stated that he measured the creek at the points where he took the photographs (Applicant's Exhibit 1) and found that the creek was 50 feet to 60 feet wide where it entered the property, with water 16 inches deep 10 feet from shore, and 12 inches deep where the creek leaves the property. The Applicant believes this flow represents low water, since there had been very little rain prior to his taking the measurements on June 29, 1987. He testified that in 20 years he has never seen the creek level at his property lower than the level he measured.

The Applicant further testified that he does not believe that other water users would be adversely affected, due to the small amount of water he is requesting. He stated that he believes a large portion of the water he would use to irrigate would return to Ashley Creek, due to the fact that the proposed place of use slants down to the creek.

9. The Montana Department of Fish, Wildlife, and Parks is objecting to the present application on the basis of possible effects to its instream flow rights in Ashley Creek, arguing that there are no unappropriated waters in Ashley Creek, and that therefore granting a new use permit will adversely affect its water rights.

FWP has purchased water rights in Ashley Creek, and a storage right in Ashley Lake (which feeds Ashley Creek), to maintain the creek's fishery resource and to maintain water quality for recreational uses. Water is released from Ashley Lake in a pattern designed to simulate a natural stream hydrograph (testimony of Jim Vashro; Department Exhibit 1), with the amount released during a given time period dependent on whether the stream's natural flows are sufficient to meet fishery/water quality needs and whether it appears that water must be left in storage to meet later needs. (Testimony of Jim Vashro, Gary Anderson.) However, much of the water which FWP releases does not make it down Ashley Creek to FWP's lowest gaging station near Kalispell, especially during the months of July and August. Often during these two months, less flow arrives in Kalispell than is released from Ashley Lake, despite the fact that Ashley

Creek is a gaining stream, and that in other months there is more flow at the Kalispell gaging station than there is at an upstream gaging station above Smith Lake (see Objectors' Exhibit 2).

(Testimony of Jim Vashro, Gary Anderson; Objectors' Exhibits 3 and 9.)<sup>1</sup>

The July-August flow loss is of great concern to FWP, since the instream flow aids in dilution of the effluent discharged by the City of Kalispell's wastewater treatment plant: if the effluent is not properly diluted, the dissolved oxygen level in the creek will fall to the point where an "oxygen barrier" is formed, preventing migration of fish into and out of Ashley Creek. (Testimony of Gary Anderson.) FWP feels that granting the application will further aggravate the adverse impacts which FWP is experiencing to its flow rights in the creek during the summer months. However, FWP does not oppose issuance of a permit to the Applicant "for time periods other than July and August", if any permit which may be issued is properly conditioned to protect FWP's senior water right. (See September 21, 1987 letter from FWP to Hearing Examiner.)

10. The City of Kalispell objects to issuance of a permit to the Applicant based on the problems the City has in diluting the effluent from its wastewater treatment plant on Ashley Creek sufficiently to meet state water quality requirements.

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<sup>1</sup> At one point in July of 1985, only 2.5 cfs arrived at the Kalispell gaging station, despite a release of 20 cfs from Ashley Lake.

Andy Hyde, water and wastewater treatment superintendent for the City of Kalispell, testified that the City has a claimed right of 5 cfs in Ashley Creek for use in dilution (Objectors' Exhibit 5). The City additionally depends on FWP's instream flow to help dilute the effluent. However, the City is presently violating state water quality standards since, even with the use of FWP water, the dissolved oxygen levels in Ashley Creek drop below the state-set minimum at the measuring site downstream from the plant.

Mr. Hyde testified that the problems with dissolved oxygen levels are increased by higher temperatures in the summer months (see Objectors' Exhibit 8), with the most serious problems occurring in July and August, when the stream flows are the lowest and temperatures are the highest, although occasionally September is also a low flow month. Mr. Hyde stated that, at a minimum, the City of Kalispell would object to any new water use withdrawals during these months, since there is not any unappropriated water in Ashley Creek and since any additional uses would further adversely affect the City's attempts to maintain water quality in the creek.

11. A review of Department records does not disclose any planned uses or developments for which a Permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein and the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following MCA §85-2-311 criteria are met:

- (a) there are unappropriated waters in the source of supply:
  - (i) at times when the water can be put to the use proposed by the applicant,
  - (ii) in the amount the applicant seeks to appropriate; and
  - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.



4. The proposed use of water, irrigation, is a beneficial use of water. See MCA §85-2-102(2).

5. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. (See Finding of Fact 11.)

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 6.)

7. There are unappropriated waters in the source of supply, in the amount the Applicant is seeking to appropriate, at times when the water can be put to the use proposed by the Applicant.

"Unappropriated waters" are those waters which have not been diverted, impounded, withdrawn, or reserved for future use by a public agency. (See generally MCA §85-2-102(1).) The Department has defined the test for determining whether there are unappropriated waters in the source of supply as twofold: whether there is water physically available at the proposed point of diversion throughout the period of diversion in at least some years (water is available in actuality, since the water has not been made unavailable by being diverted, impounded or withdrawn upstream from the point of diversion), and whether the Applicant can utilize the requested amount of water throughout the period of appropriation in some years without being called by a senior user (water is legally available). See In the Matter of the Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley (March, 1988 Proposal for Decision.)

Water is physically available at the Applicant's proposed point of diversion, in the amount the Applicant is requesting, as evidenced by the Applicant's testimony and exhibits. (See Finding of Fact 8.) In addition, the fact that more flow arrives at Kalispell than is released from Ashley Lake except in July and August indicates that the water needs of the users other than FWP and City of Kalispell are being met, and unappropriated water is available in the source of supply apart from July and August, since demands on the stream over and above the natural flow of the stream would result in a reduction in FWP's released amount.<sup>2</sup>

However, it does not appear that there will be any year that the Applicant could divert the requested amount of water throughout the proposed period of diversion without being called by a senior user. Testimony and exhibits by the Objectors indicate that the flow of Ashley Creek is always too low during July and August to supply their water requirements. They would therefore need to call the stream during that period every year. (See Findings of Fact 9 and 10.) However, this leaves April,

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<sup>2</sup> Ashley Creek is heavily overappropriated on paper. (See Objectors' Exhibits 3 and 9.) However, the evidence available on the record indicates that there is water available for appropriation except during July and August; whether due to all of the claimed rights not being used, or not being used in their entirety, or whether there is substantial return flow to the stream, or a combination of these and/or other factors is not known. If this situation changes, the Applicant would be subject to call until and unless the senior needs were met. However, a permit cannot be denied on the basis of a possibility that at some unknown future point in time, the water use may change to such a degree that the Applicant would not be able to appropriate water often enough to make his proposed irrigation feasible.

May, June, September in most years, and October out of the Applicant's requested period of diversion as times that the Applicant can irrigate without being called.

8. Although the record in this matter indicates that the amount of water the Applicant is requesting is not available throughout the period during which the Applicant seeks to appropriate, the Department may issue a permit subject to terms, conditions, restrictions, and limitations which are necessary to satisfy the criteria of §85-2-311. See MCA §85-2-312(1). Therefore, a permit may be granted if it can be conditioned so as to limit the Applicant's period of diversion to those periods throughout which there are unappropriated waters in the source of supply in the amount the Applicant is seeking to appropriate, providing the Applicant can put the water to the proposed use under the conditions which have been imposed.

As noted above in Conclusion of Law 7, unappropriated water is available, as set forth in MCA §85-2-311(1)(a), during April, May, June, September and October, and the Applicant has testified that he can use the water at those times. (See also Finding of Fact 6.) Therefore the period of appropriation will be reduced to those months.

9. The water rights of prior appropriators will not be adversely affected.

The record does not disclose any impact the Applicant's proposed project would have upon the Objectors or other prior appropriators, apart from the possibility of having to call for water every year during July and August. Although having to call

for water does not constitute adverse effect per se, the Applicant will not be permitted to irrigate during these months since the testimony and exhibits indicate that unappropriated water is not available in July and August.

Objector FWP has indicated that it will not oppose issuance of the permit for time periods other than July and August. (See Finding of Fact 9.) Although the City of Kalispell indicated that it would prefer to have more flow in Ashley Creek at all times, testimony indicates that July and August are the problem times for the City. (See Finding of Fact 10.) Furthermore, the City is not entitled to rely on more flow than its own claimed rights plus FWP's instream flow release. When this amount is making it down to the City's place of use, the City has no basis for objection.

10. FWP has requested that any permit issued in this matter be conditioned to require the Applicant to cease diverting whenever the flow at the Kalispell gaging site is less than the flow being released from Ashley Lake. (See September 21, 1987 letter from FWP to the Hearing Examiner.) However, FWP has not suggested how the Applicant would know when this situation was occurring. Therefore, any permit issued in this matter will generally be made subject to all prior and existing water rights, which includes those that FWP has purchased and claimed for instream flow uses. The Applicant of his own accord may arrange with FWP to obtain the suggested flow information, to ensure that he is not impinging on FWP's senior water use right.

11. The Applicant's requested flow rate will be reduced to 55 gpm, based on the reduced size of the place of use and on the Applicant's testimony. (See Finding of Fact 7.) Since it is not possible for the Applicant to divert his entire requested volume amount, based on a flow rate of 55 gpm and on Applicant's intended pattern of use of 12 hours per day, seven days a week (Finding of Fact 6), the volume will be reduced to 16.65 acre-feet (55 gpm for 12 hours a day, multiplied by the number of days in the period of use to which the Applicant has been restricted).

THEREFORE, based upon the foregoing Findings of Fact and proposed Conclusions of Law, the Hearing Examiner makes the following:

#### PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 60194-s76LJ is hereby granted to Leonard L. and Leroy A. Cobler to appropriate 55 gpm up to 16.65 acre-feet of water per year for sprinkler irrigation of 7.29 acres of land located in the N $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 29, Township 28 North, Range 22 West, Flathead County, Montana. The water will be diverted from Ashley Creek, a tributary of the Flathead River, by means of a gas pump located at the point of diversion in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 29, Township 28 North, Range 22 West, Flathead County, Montana.

The period of use shall be April 15 through June 30, inclusive, and September 1 through October 31, inclusive, of each year. The priority date for this Permit is July 12, 1985 at 10:03 a.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit uses.

D. The Permittee shall record the flow rates and volumes he is diverting, as well as the times of his diversions. These records shall be made available to the Department upon request.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party

adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present

in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 23<sup>rd</sup> day of March, 1988.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612



CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 23rd day of March, 1988, as follows:

Leonard and Leroy Cobler  
80 Cobler Village Road  
Kalispell, MT 59901

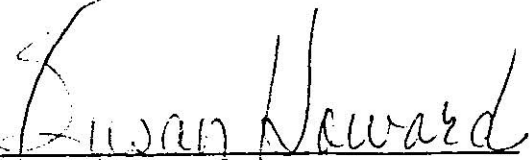
Montana Dept of Fish, Wildlife  
and Parks  
Larry G. Peterman  
1420 East 6th Avenue  
Helena, MT 59620

Robert H. Lehman  
1930 Hwy 2 West  
Kalispell, MT 59901

City of Kalispell  
Attention: Andrew J. Hyde  
Drawer 1997  
Kalispell, MT 59903-1997

William B. Davis  
2814 East Drachman Street  
Tucson, AZ 85716

Chuck Brasen  
Kalispell Field Manager  
P O Box 869  
Kalispell, MT 59901

  
Susan Howard  
Hearings Reporter